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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. [redacted] 52

DAN TEHAN, Sheriff of Hamilton County, Ohio,
Petitioner,
vs.
UNITED STATES OF AMERICA ex rel. EDGAR I. SHOTT, JR.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

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INTEREST OF AMICUS CURIAE

For some thirty-one years prior to this Court's decision in *Griffin v. California,* 380 U.S. 609 (1965), California followed a rule based upon a 1934 amend-

ment to its Constitution which permitted limited comment upon, and consideration of, the failure of an accused to explain or deny evidence presented against him during his criminal trial. This procedure was expressly sanctioned by this Court in *Adamson v. California,* 332 U.S. 46 (1947). In *Griffin,* this Court overruled *Adamson* and held that such comment is now barred by the Fifth Amendment privilege against self-incrimination as made applicable to the States through the Fourteenth Amendment.

Because of the tremendous impact which would be had upon the administration of justice in the State of California by a decision compelling the retroactive application of this doctrine, the Attorney General for the State of California submits this brief in support of the position of petitioner Dan Tehan, Sheriff of Hamilton County, Ohio.

Prior to this Court's decision in *Griffin,* literally thousands of cases were tried in California in which comment was made upon the failure of the accused to take the stand. Those reaping the greatest benefit from a rule compelling retroactive application of *Griffin* would be hardened and dangerous criminals under lengthy sentences imposed many years before *Griffin.* Their cases would offer the least likelihood of a successful retrial since in many, if not most, instances, witnesses and evidence are no longer available. To require a general release of these undeniably guilty felons would have a chaotic effect upon the administration of criminal justice in the State of California.

ARGUMENT

I

THE DOCTRINE ANNOUNCED BY THIS COURT IN GRIFFIN v. CALIFORNIA, SHOULD NOT BE APPLIED TO JUDGMENTS WHICH BECAME FINAL PRIOR TO THE DATE OF THAT DECISION.

In *Griffin v. California,* 380 U.S. 609 (1965), this Court overruled *Adamson v. California,* 332 U.S. 46 (1947), and held that comment upon the failure of an accused to testify during his criminal trial in state court now violates the federal constitution. The sole issue presented in this case is whether this newly defined constitutional right, which prohibits a state trial procedure previously sanctioned by this Court, must be applied retroactively to place in jeopardy the thousands of state court convictions in which such comment occurred.

In *Linkletter v. Walker,* 14 L.Ed.2d 601 (1965), this Court, operating on the premise that the Constitution neither prohibits nor requires that a new constitutional rule be given retroactive effect, held that *Mapp v. Ohio,* 367 U.S. 643 (1961), should not be applied retroactively. The factors this Court considered salient to that determination were summarized as follows:

> "In short, we must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of retrospective application of *Mapp.*" *Id.* at 612.

A similar examination of the purpose of the doctrine enunciated in *Griffin* and of the impact which

a holding of compelled retroactivity would have upon the administration of criminal justice leads to the conclusion that it also should be denied retroactive application. The purpose of *Griffin* is not to protect the innocent from conviction, but rather to remove the coercion to testify which an accused might feel were such comment permissible. This purpose would not be served by retroactive application. Furthermore, retroactive application would have a devastating impact upon the administration of criminal justice in those states which permitted comment upon a defendant's failure to testify—a procedure expressly sanctioned by this Court for some fifty-seven years prior to its decision in *Griffin. Twining v. New Jersey,* 211 U.S. 77 (1908); *Adamson v. California,* 332 U.S. 46 (1947).

A. The purpose of the doctrine announced in Griffin v. California would not be served by making the rule retroactive.

After first characterizing the California comment rule as "in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify," this Court, in holding that such comment violated the Fifth Amendment, said:

> "For comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' *Murphy v. Waterfront Comm'n.,* 378 U.S. 52, 55, which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin v. California, supra,* at 614.

Thus, the apparent purpose of the *Griffin* doctrine is to preclude the use in state criminal trials of a procedure which tends to coerce defendants into becoming witnesses by imposing a penalty on their failure to testify. This Court did not hold that the inferences permitted by the California comment rule were unreasonable or unfair and, indeed, recognized that the jury might well draw inferences from a defendant's silence if no comment were made. *Griffin v. California, supra,* at 614.

In holding in *Linkletter* that the doctrine of the *Mapp* case was not to be applied retroactively, this Court distinguished three constitutional decisions which were applied retroactively[1] on the ground that the principle enunciated in each "went to the fairness of the trial—the very integrity of the fact-finding process," while in *Mapp* the fairness of the trial was not in issue. "All that the petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned. . . ." *Linkletter v. Walker, supra,* at 614.

We submit that similarly in *Griffin,* the principle enunciated is one which does not go to the fairness of trial and does not affect the integrity of the fact-finding process. In *Adamson v. California,* 332 U.S. 46 (1947), this Court had occasion to evaluate the fairness of the California comment rule. A majority of this Court said:

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[1] *Griffin v. Illinois,* 351 U.S. 12 (1956); *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Jackson v. Denno,* 378 U.S. 368 (1964).

> "California has prescribed a method for advising the jury in the search for truth. However sound may be the legislative conclusion that an accused should not be compelled in any criminal case to be a witness against himself, we see no reason why comment should not be made upon his silence. It seems quite natural that when a defendant has opportunity to deny or explain facts and determines not to do so, the prosecution should bring out the strength of the evidence by commenting upon defendant's failure to explain or deny it." *Id.* at 56.

Recognizing the basic fairness of the California comment rule, a majority of this Court went on to say:

> "The purpose of due process is not to protect an accused against a proper conviction but against an unfair conviction. When evidence is before a jury that threatens conviction, it does not seem unfair to require him to choose between leaving the adverse evidence unexplained and subjecting himself to impeachment through disclosure of former crimes. Indeed, this is a dilemma with which any defendant may be faced. If facts, adverse to the defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by a witness who may be vulnerable to impeachment on cross-examination. The defendant must then decide whether or not to use such a witness. The fact that the witness may also be the defendant makes the choice more difficult but a denial of due process does not emerge from the circumstances." *Id.* at 57-58.

Justice Frankfurter, in a separate concurring opinion, also found the California comment rule eminently fair. He said:

> "Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do every day violates the 'immutable principles of justice' as conceived by a civilized society is to trivialize the importance of 'due process'." *Id.* at 60.

We submit that the purpose of the *Griffin* doctrine would in no way be served by making it retroactive. The purpose of this rule precluding comment is not to protect the innocent from conviction, but rather to remove the coercion to testify which an accused might feel were comment permissible. This is a rule which by its very nature contemplates the prospective prevention of what is now deemed a coercive practice. Its purpose would not be served by overturning past convictions of undeniably guilty defendants simply because the prosecutor and the court followed a procedure which then had the sanction of this Court as a practice completely consistent with due process.

B. A holding that the decision in Griffin v. California must be applied retroactively would undermine the reliance of state courts and prosecutors on decisions of this Court and would seriously impair the administration of criminal justice.

Prior to *Griffin v. California,* this Court, since 1908, had expressly sanctioned properly proscribed comment upon the failure of an accused to testify. *Twining v. New Jersey,* 211 U.S. 77 (1908); *Adamson v. California,* 332 U.S. 46 (1947). Until *Griffin,* such comment was viewed as a state trial procedure which squared completely with due process standards of fairness. *Adamson v. California, supra,* at 55-58.

The existence of *Twining* and *Adamson* are operative facts and the consequential reliance upon them by state courts and prosecutors cannot justly be ignored. To the extent that this Court in *Linkletter* deemed reliance by the various states upon a body of constitutional law in the administration of their criminal courts as an important factor militating against the retroactive application of *Mapp,* an even more compelling case arises for holding against the retroactive application of *Griffin.*

In the illegal search and seizure cases, state law enforcement officials knew that the conduct in issue violated the federal constitution. This Court had expressly so stated in *Wolf v. Colorado,* 338 U.S. 25 (1949). However, prior to *Griffin v. California,* or in any event, prior to *Malloy v. Hogan,* 378 U.S. 1 (1964), state judges and prosecutors had no reason to suspect that comment upon the failure of an accused to testify in any way contravened the federal constitution.

The thousands of cases that were finally decided in reliance upon *Twining* and *Adamson* cannot be obliterated. A newly defined constitutional right which now prohibits a state trial procedure that previously had the express sanction of this Court should not be applied retroactively. To do so would not only impose impossible burdens upon the administration of criminal justice in those states which have allowed comment, but it would have a devastating effect upon the confidence of the bench, the bar, and the general public.

For example, in 1934, the People of the State of California overwhelmingly adopted an amendment to their Constitution which permitted comment upon the failure of an accused in a criminal trial to testify. After the amendment, prosecutors and judges in California followed this constitutional directive as, indeed, they were compelled to do by their oaths of office. Furthermore, such comment was given the express sanction of this Court in 1947 in *Adamson*. During the interim between the constitutional amendment and this Court's decision in *Griffin*, thousands of convictions occurred in which defendants failed to take the stand and comment was made upon that fact. The tremendous impact of a holding that *Griffin* must be applied retroactively is readily apparent.

Moreover, it is common knowledge that numbered among those prisoners who would derive the greatest benefit from a holding of compelled retroactivity are those felons who are under long term sentences as habitual offenders. It is these hardened and dangerous

criminals under long term sentences whose cases would afford the least likelihood of a successful retrial. To require a general release of such undeniably guilty prisoners would cripple the orderly administration of the criminal laws.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should hold that the doctrine of *Griffin v. California* is not available to attack a final judgment of conviction. We therefore respectfully urge that this Court reverse the decision of the Court of Appeals for the Sixth Circuit in this case.

Dated, San Francisco, California,
August 18, 1965.

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